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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 312

JOEL SIMON MEYERS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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JOEL SIMON MEYERS,

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on January 28, 1969.

Opinions Below

The decision of the Court of Appeals is not officially reported. It is unofficially reported at 1 SSLR 3335 and is set out in the Appendix, *infra*, pp. 1a-9a. The dissenting opinion of Circuit Judge Smith is set out at p. 9a of the Appendix.

Jurisdiction

The judgment of the Court of Appeals was entered on January 28, 1969. On February 19, 1969, Mr. Justice Har-

lan entered an order extending until March 29, 1969 the time for filing a petition for writ of certiorari. On March 7, 1969, the Court of Appeals granted a motion for leave to file a Petition for Rehearing and Rehearing in *Banc,* which Petition was denied on May 5, 1969. On June 9, 1969, Mr. Justice Harlan entered an order extending until July 3, 1969 the time for filing this petition for certiorari. Jurisdiction is conferred on this Court by 28 U. S. C. §1254(1).

Questions Presented

1. Petitioner was forcibly ejected from the induction station for leafleting several hours before the induction ceremony. Did the failure to give him the warning prescribed by AR 601-270, paragraph 40*c*, or any other warning, at the time of his ejection from the station, that he was subjecting himself to conviction for the felony of induction refusal, deprive him of a clear opportunity to know the consequences of his actions in violation of Army Regulations and the due process clause of the Fifth Amendment?

2. The district court gave the "Allen charge" in a case of a two-count indictment after a trial of just over one day with only six witnesses, after less than three hours of deliberations by the jury, and after the court had been advised that the jury was deadlocked 11-1 for conviction on both counts. Under these circumstances, does its use (*a*) violate the due process clause of the Fifth Amendment, or (*b*) so far exceed the limited circumstances under which it has customarily been used as to justify the exercise of this Court's power of supervision to regulate the use of the Allen charge.

3. Is the "Allen charge" inherently coercive of the minority of jurors, thus depriving the petitioner of the fair deliberations to which he is entitled under the due process clause of the Fifth Amendment?

Statutes and Regulations Involved

Military Selective Service Act of 1967, Sec. 12(a); 50 App. U. S. C. Sec. 462(a), is set out in the Appendix, *infra*, pp. 10a-11a.

Army Regulation 601-270, para. 40*c*, is set out in the Appendix, *infra*, pp. 11a-13a.

Statement of the Case[1]

Petitioner, registered with Local Board No. 35 in Brooklyn, was ordered to report for induction on May 4, 1967 at Fort Hamilton, New York. He arrived at the induction center on that day at approximately 7 a.m., went to a control room where other inductees were seated waiting for the pre-induction orientation, and handed out leaflets protesting the war in Vietnam. When the enlisted man who ran the orientation program entered the room, he asked petitioner to stop leafleting. Petitioner continued to leaflet.

The military police arrived and led him to the back of the room where they discussed his rights on a federal reservation (T. 146-47). They then physically removed petitioner to the office of the Provost Marshal where he remained

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[1] Except for those facts which are supported by references to the transcript of trial (designated by the letter "T"), the Statement of the Case is based upon the opinion of the Court of Appeals.

for about 15 minutes before being escorted out of the Fort Hamilton gate (T. 148). The time was approximately 8:30 a.m. (T. 141-42; 148). The induction ceremony generally takes place between 3 and 4:30 p.m. (T. 121).

The petitioner was indicted on August 1, 1967 in a two-count indictment charging him with failure to report for and submit to induction (Count I) and hindering and interfering, by force, violence and otherwise, with the administration of the Selective Service Act (Count II), in violation of Title 50 App., U. S. C. Sec. 462(a). His trial, which was before a jury, lasted just over one day.[2] Six witnesses, all government employees, testified.

The jury deliberated approximately two hours and 50 minutes before reporting back to the judge at around 4:10 p.m. that they were deadlocked 11 to 1 for conviction on each charge. The judge, after commenting on "the length of the trial, the amount of testimony that was taken, the number of witnesses that have been heard . . ." (T. 289), read the Allen charge. The jury left the courtroom and returned at around 4:30 p.m. with a verdict of guilty on Count I and not guilty on Count II.

Petitioner was sentenced to four years' imprisonment. The conviction was affirmed by the Court of Appeals, Circuit Judge Smith dissenting, on January 28, 1969. Judge Smith stated that petitioner should have been given an opportunity to change his mind and take the oath before being charged with a refusal to submit to induction (Ques-

[2] The trial began on April 3, 1968 at 11:30 a.m. and continued that day until 4:30 p.m. The next day, court reconvened at 11:30 a.m. and testimony was taken for one hour, at which point the Government and defense rested. Both sides gave summations and the jury was charged the following morning.

tion 1, *supra*) and that the giving of the Allen charge under the circumstances of this case was improper (Question 2, *supra*).

Reasons for Granting the Writ

1. Certiorari should be granted because the decision of the Court below, upholding the failure to give the warning prescribed by Army Regulations, is in conflict with decisions of the Third, Sixth and Ninth Circuits and violates established notions of due process.

It is a fundamental principle of due process that one is entitled to "fair warning" that conduct is criminal before it may be the subject of prosecution. *Bouie* v. *Columbia*, 378 U. S. 347, 350 (1964). *Accord, Winters* v. *New York*, 333 U. S. 507 (1948). In accordance with that principle, the army has adopted a series of regulations governing induction station procedures which prescribe the actions to be taken by station personnel when a registrant expresses an intention not to submit to induction. AR 601-270, para. 40*c*, App., *infra*, pp. 11a-13a, provides that a registrant who refuses to submit to induction will be advised that he is liable to conviction for a felony, with a maximum penalty of five years' imprisonment and $10,000 fine. He will then be given a second opportunity to be inducted. The regulations then prescribe that upon persisting in his refusal he will be requested to execute a signed statement that he refuses to be inducted into the Armed Forces of the United States.

The procedure is designed to avoid any uncertainty as to the moment when a civilian passes into military jurisdiction, *Corrigan* v. *Secretary of Army*, 211 F. 2d 293 (9th Cir. 1954), and also to give the registrant a "last clear

chance to change his mind." *Chernekoff* v. *United States*, 219 F. 2d 721, 725 (9th Cir. 1955).

Although the jury found that the defendant did not intend to submit to induction when he appeared at the Examining Station, such intention does not excuse the failure of the Army to give the warning required by its own regulations.

The holding of the majority below that the regulation need not be followed where the registrant has manifested an intent not to submit to induction directly contradicts the holding of the Court of Appeals for the Ninth Circuit in *Chernekoff* v. *United States, supra.* In that case the registrant reported to the induction station and gave a statement that he refused to submit to induction. Despite this clear statement of intent, the court held that he "should have been given the opportunity granted him by the Army's own regulation to seriously reflect . . . " 219 F. 2d at 725. The court noted that it was not relevant that he might not have changed his mind, the regulation being "couched in mandatory, not discretionary, language." *Ibid.* The regulation itself, providing for an elaborate warning and a second opportunity to submit, reflects a clear predisposition by its authors to go beyond initial expressions of intent, however clear. The requirement is appropriate, amply justified by the tensions surrounding the induction process and the not infrequent situation where an initially hesitant registrant decides to accept induction.

The need for the regulation's warning of possible criminal prosecution is clearly demonstrated by the facts of this case. Although petitioner was leafleting during the orien-

tation process against the wishes of the station personnel who were present, he did not—according to the jury's verdict on Count II of the indictment—"hinder and interfere" with the induction process. Nevertheless, when he refused to desist, he was forcibly ejected with no warning at all that his leafleting had subjected him to two felony prosecutions.

The principle of *Chernekoff* has recently been endorsed by the Third Circuit in *United States* v. *Kroll*, 402 F. 2d 221, 222 (1968) ("a registrant is not guilty of a crime until he has been given the prescribed warning concerning penalties") and the Sixth Circuit in *Anderson* v. *Hershey*, —— F. 2d ——, 2 SSLR 3015, 3016, n. 10 (April 11, 1969) ("failure to warn a registrant at the induction ceremony of the consequences of refusing induction can invalidate a conviction"). In addition, the Ninth Circuit has on at least three occasions cited its decision in *Chernekoff* approvingly. *Parrott* v. *United States*, 370 F. 2d 388, 395, *cert. denied* 387 U. S. 908 (1967), *Edwards* v. *United States*, 395 F. 2d 453, 457, *cert. denied* 393 U. S. 845 (1968), *Oshatz* v. *United States*, 404 F. 2d 9, 12 (1968). *See also, United States* v. *Sloan*, 2 SSLR 3004 (N. D. Cal., Mar. 26, 1969).

Petitioner seeks an endorsement of the principle that selective service personnel are not free to ignore their own regulations to the prejudice of individual registrants. *Cf. Service* v. *Dulles*, 354 U. S. 363 (1957). We agree with the court in *Oshatz* v. *United States*, *supra*, that, although minor procedural irregularities not resulting in prejudice to the registrant may not justify reversal of a conviction, irregularities such as that in *Chernekoff* and in the instant case are so fundamentally prejudicial as to deprive the registrant of due process. It is this approach which the

courts have consistently followed with regard to selective service regulations, *Johnson* v. *United States*, 285 F. 2d 700 (9th Cir. 1960); *Knox* v. *United States*, 200 F. 2d 398 (9th Cir. 1952), and which the court in *Briggs* v. *United States*, 397 F. 2d 370, 373 (9th Cir. 1968), says must be applied to the Army Regulations.

With the exception of the court below, the decisions have in fact adopted that approach with regard to AR 601-270. Though minor deviations from its prescription have been tolerated, counsel has not found one reported case sustaining a conviction since its promulgation where some warning was not given to one who appeared at the induction station. Thus, in *Bradley* v. *United States*, 218 F. 2d 657 (9th Cir.), *rev'd on other grounds*, 348 U. S. 967 (1955), the court held that the failure to administer the formal induction ceremony prescribed by the regulations did not preclude conviction for refusal to submit. Nevertheless, it was noted that the registrant had been taken into another room where a sergeant explained the penalty for refusing to submit. The registrant then signed a statement that he refused to be inducted. In the court's words:

> "He was told the penalty for refusal to submit to induction, and he stated understandingly and positively that he would not submit." *Id.* at 660.

Similarly, in *Parrott* v. *United States*, *supra*, there was a slight deviation from the formal procedure required by the regulations. Nevertheless, citing *Chernekoff*, the court found that the registrant "had not only warning, but full knowledge of the precise penalty." 370 F. 2d at 395.

In other words, even where, for one reason or another, the precise procedure may not or could not have been ad-

ministered, courts have at least demanded that the registrant be fully apprised of the consequences of his refusal to submit. According to the Government's testimony, several persons could have warned the petitioner that his actions were the equivalent of a refusal to submit to induction. One member of the Military Police testified to a conversation with the defendant at the time of his ejection in which he stated his authority over civilians on a federal reservation (T. 146-47). He or his partner, who was also with the defendant, certainly could have added something about the consequences of being ejected. He then testified that he and his colleagues took the defendant to the Military Police station and subsequently to the Provost Marshal's office, where he remained at least fifteen minutes. During this period before being ejected from the Fort, there was absolutely no excuse why the warning required by the regulations could not have been given to the petitioner. As Circuit Judge Smith said in dissent, he was "entitled to an opportunity to change his mind and take the oath before being charged with a refusal to submit to induction." App., *infra*, p. 9a.

Whether under the circumstances of this case it is the requirement of due process or Army Regulations which were offended matters little. Both protect persons from running the risk of criminal prosecution without a clear warning of the consequences of their actions. Where, as in this case, a warning could so easily have been given, its absence is so prejudicial as to vitiate a conviction.

Petitioner respectfully submits that this Court should resolve the conflict between the case at bar and the *Chernekoff* line of cases so as to insure that induction station personnel do not ignore procedures which have been established to insure fairness to registrants.

2. Certiorari should be granted so that this Court may re-examine the continuing validity of the Allen charge, or at the least, reconcile the divergent practices regarding its use which have been adopted in the circuit and district courts.

Since the approval by this Court in *Allen* v. *United States,* 164 U. S. 492 (1896), of the supplemental charge to deadlocked juries now commonly known as the "Allen charge," only two cases in this Court, *Burton* v. *United States,* 196 U. S. 283 (1905) and *Brasfield* v. *United States,* 272 U. S. 448 (1926), have reviewed the propriety of the Allen charge. Both of those dealt only with the limited situation where a judge inquires as to the division of the jury before giving the charge. The practice was condemned.[3] But in recent years the use of the Allen charge itself has come under increasing attack. Several opinions in the Fifth Circuit point out the deficiencies of the charge. See *Thaggard* v. *United States,* 354 F. 2d 735, 739 (5th Cir.), *cert. denied,* 383 U. S. 958 (1966) (Coleman, *J.*, concurring); *Walker* v. *United States,* 342 F. 2d 22, 27 (5th Cir.), *cert. denied,* 382 U. S. 859 (1965) (Brown, *J.*, dissenting); *Green* v. *United States,* 309 F. 2d 852, 854 (5th Cir. 1962); *Andrews* v. *United States,* 309 F. 2d 127, 129 (5th Cir.), *cert. denied,* 372 U. S. 946 (1965) (Wisdom, *J.*, dissenting); *Huffman* v. *United States,* 297 F. 2d 754, 755 (5th Cir.), *cert. denied,* 370 U. S. 955 (1962) (Brown, *J.*, dissenting).[4] In addition, commentators have pointed to the

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[3] In *Jenkins* v. *United States,* 380 U.S. 445 (1965), the Court reversed a conviction because the Allen charge was given in conjunction with a direction to the jury "to reach a decision in this case."

[4] In addition, two states have prohibited the use of the Allen charge. *State* v. *Randall,* 137 Mont. 534, 353 P. 2d 1054 (1960); *State* v. *Thomas,* 86 Ariz. 161, 342 P. 2d 197 (1959). Courts in

inherently coercive nature of the charge and have called for its abandonment. *See* Comment, "Deadlocked Juries and Dynamite: A Critical Look at the 'Allen Charge'" 31 U. CHI. L. REV. 386 (1964); Note, "Due Process, Judicial Economy and the Hung Jury: A Reexamination of the *Allen* Charge" 53 VA. L. REV. 123 (1967); Note, 34 TULANE L. REV. 214 (1959); AMERICAN BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, TRIAL BY JURY, 146-56 (Tent. Draft, 1968).

The Allen charge raises serious constitutional questions. A defendant is entitled by the 5th and 6th amendments to a trial by a free and independent jury. This means and ought to mean a jury free of every influence except the law and evidence. *See, e.g., Irvin* v. *Dowd,* 366 U. S. 717 (1961); *Sheppard* v. *Maxwell,* 384 U. S. 333 (1966); *Estes* v. *Texas,* 381 U. S. 532 (1965). *See also, Turner* v. *Louisiana,* 379 U. S. 466 (1965).

The Allen charge is an invasion of the jury's province by the court which encroaches upon the constitutional right to trial by jury. The qualifications frequently used in modern versions of the charge do not save it from being taken as a command from the bench for a verdict. The words of Chief Judge Brown merit the serious consideration of this court:

> "The fact is that in many phases of criminal law we have come a long, long way since 1896. There is no longer any place for the Allen charge . . . In the final analysis the Allen charge itself does not make sense.

Idaho, Iowa, Alabama and Kansas have discouraged the use of the charge. *State* v. *Moon,* 20 Idaho 222, 117 Pac. 757 (1911); *Middlestate Util. Co.* v. *Incorporated Tel. Co.,* 222 Iowa 275, 271 N. W. 180 (1937); *Crowe* v. *State,* 23 Ala. 271, 124 So. 121 (1929); *State* v. *Neff,* 169 Kan. 116, 218 P. 2d 248 (1950).

> All it may rightfully say is that there is a duty to consider the views of others but that a conscientious person has finally the right and duty to stand by conscience. If it says that and nothing more it is a superfluous lecture in citizenship. If it says more to declare that there is a duty to *decide*, it is legally incorrect as an interference with that rightful independence." *Huffman* v. *United States, supra*, 297 F. 2d at 759 (dissenting opinion).

If the Allen charge is not repudiated outright, this Court should at least delineate the circumstances under which it may properly be given. Whatever guidelines governing its use have been articulated by circuit courts were ignored by the district court. If allowed to stand, the opinion below would sanction the indiscriminate use of the Allen charge and sweep aside the repeated warnings that the charge "approaches the limits" to which a trial court should go in asking jurors to reconsider their views. *See, e.g., United States* v. *Harris*, 391 F. 2d 348, 354 (6th Cir.), *cert. denied*, 393 U. S. 874 (1968); *United States* v. *Rogers*, 289 F. 2d 433, 435 (4th Cir. 1961). *Accord, United States* v. *Smith*, 303 F. 2d 341, 343 (4th Cir. 1962).

In the Allen charge cases since 1896, several indicia of coercion have emerged which, either by themselves or in combination, have justified reversal of a conviction; this case has the rather extraordinary distinction of being the first to have every one of those indicia.

a. *Length and complexity of trial.* The two counts of petitioner's indictment grew out of one brief incident at the induction center. The testimony at trial, which took just over one day, was simple and uncontradicted. By contrast, every single court, including eight of the circuits,

which has discussed this question has noted, when upholding the charge, the length or complexity of the indictment or trial. See, *e.g., Estes* v. *United States,* 335 F. 2d 609 (5th Cir.), *cert. denied,* 379 U. S. 964 (1965) (17 day trial); *Tolub* v. *United States,* 309 F. 2d 286 (2d Cir. 1962) (12 count indictment); *Bowen* v. *United States,* 153 F. 2d 747 (8th Cir. 1946) (13 count indictment); *Mills* v. *Tinsley,* 314 F. 2d 311 (10th Cir. 1963) (ten day trial); *Muldrow* v. *Daly,* 329 F. 2d 886 (D. C. Cir. 1964) (eight day trial); *United States* v. *White,* 382 F. 2d 445 (7th Cir.), *cert. denied,* 389 U. S. 1052 (1968) (8 count indictment); *Wolin* v. *United States,* 211 F. 2d 770 (4th Cir. 1954) (one week trial); *Logsdon* v. *United States,* 253 F. 2d 12 (6th Cir. 1958) (35 count indictment).

Judge Bruchhausen, after a trial of barely one day with only six witnesses, explained the Allen charge by "considering the length of the trial, the amount of testimony that was taken, the number of witnesses that have been heard . . ." (T. 289). But these boilerplate references did not apply to this trial and, in Judge Smith's words, "the Allen charge was uncalled for in the circumstances of this brief trial . . . ." App., *infra,* p. 9a.

The one case which has discussed this issue directly condemned the use of the Allen charge when the indictment was "but a single count, and that was not complex." *United States* v. *Meisch,* 370 F. 2d 768, 774 (3d Cir. 1966). The court observed additionally that the testimony of the two witnesses was "brief and to the point." *Ibid.*

b. *Disclosure by the jury that it stands divided for conviction.* When the jury reported that it was deadlocked, the foreman volunteered the information that the jurors stood 11-1 for conviction on both counts. At that point, the trial

judge gave the Allen charge. As Judge Smith pointed out, the charge was "necessarily coercive here, since the lone dissenter presumably knew that the judge had been informed that only one juror was holding out for acquittal." App., *infra*, p. 9a.

One circuit court has explicitly adopted Judge Smith's position. In *Mullin* v. *United States*, 356 F. 2d 368 (D. C. Cir. 1966), Judge (now Chief Justice) Burger approved the declaration of a mistrial where the jury revealed that it stood 7 to 4 for conviction, with one undecided, "especially in a case involving less than two trial days." *Id.* at 370. *See also, Williams* v. *United States*, 338 F. 2d 530 (D. C. Cir. 1964).

It is true that most of the reported cases condemning such disclosure have involved requests for that information by the judge. *E.g., Brasfield* v. *United States*, 272 U. S. 449 (1926); *United States* v. *Dunkel*, 173 F. 2d 506 (2d Cir. 1949). However, the principle underlying such cases is that a small minority of jurors will tend to be coerced if, knowing that the judge knew of their numerical division, they believe that the warning to reconsider their views is directed at them. Their belief being the relevant factor, whether or not the judge acquires that knowledge by inquiry makes no difference. The prejudice to the defendant is the same whether the misconduct was the jury's or the judge's.

The majority below cited *Bowen* v. *United States*, 153 F. 2d 747 (8th Cir. 1946) to the contrary, but in fact *Bowen* intimated that if, as here, the court had been advised that the jury was split eleven to one on *every* issue, the charge would have been defective. But the court said that the jury's note revealed disagreement only on *some*

issues. It is pertinent to note, in addition, that recognizing some impropriety in even this limited disclosure, the court felt a mistrial inappropriate after such a "long and expensive trial" involving three defendants. *Id.* at 752.

Moreover, the jury in *Bowen* did not disclose whether it stood for conviction or acquittal. Though the Second Circuit did not comment on this factor below, ironically it suggested only last year that an Allen charge following a jury's disclosure of its division may only have been saved by the fact that "the jury did not reveal whether the majority were for acquittal or conviction. . . ." *United States* v. *Rao*, 394 F. 2d 354, 356 (2d Cir.), *cert. denied*, 393 U. S. 845 (1968).

c. *Length of deliberation between Allen charge and verdict.* After the jury reported that it was deadlocked 11-1 for conviction on both counts, the trial judge gave the Allen charge. The jury reported back less than twenty minutes later with a clear compromise verdict of guilty on Count I and not guilty on Count II. During that time, the lone dissenter was persuaded to join his co-jurors in finding petitioner guilty of failure to report, while eleven jurors who, during almost three hours of deliberation, had thought petitioner also guilty of interfering with the induction process, were persuaded to join the lone dissenter in acquitting on this charge. That all twelve jurors changed their votes during the twenty minutes following the Allen charge is dramatic evidence that they understood the charge to be a command to reach a verdict.

The language of the court in *United States* v. *Rogers*, 289 F. 2d 433, 436 (4th Cir. 1961) commenting on the short interval between the Allen charge and the verdict is particularly appropriate:

> "The time interval was quite long enough for acceptance of a theory of majority rule, but was hardly long enough to have permitted a painstaking re-examination of the views which the minority had held steadfastly until the charge was given."

This reasoning was approved by the Sixth Circuit in *United States* v. *Harris,* 391 F. 2d 348 (6th Cir. 1968) where there was also a short interval between the charge and the jury's decision.

In short, it may be said that no court has ever approved the use of the Allen charge under the circumstances of this case. Without further review by this Court its use may become indiscriminate.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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July 3, 1969

APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 267—September Term, 1968.

(Argued December 12, 1968 Decided January 28, 1969.)

Docket No. 32820

UNITED STATES OF AMERICA,

Appellee,

—against—

JOEL SIMON MEYERS,

Appellant.

Before:

MOORE, SMITH and HAYS,

Circuit Judges.

Appeal from a judgment of conviction, after a two-day jury trial in the Eastern District of New York, Walter Bruchhausen, *Judge,* for willful failure to report for and submit to induction in the armed forces of the United States. 50 U. S. C. App. §462(a).

Affirmed.

MOORE, *Circuit Judge*:

Joel Simon Meyers (appellant) was convicted, after a two-day jury trial in the Eastern District of New York, of willful failure to report for and submit to induction in the armed forces of the United States. 50 U. S. C. App. §462(a). The jury returned a verdict of not guilty on a companion charge of hindering and interfering, by force, violence and otherwise the administration of the Universal Military Training and Service Act. 50 U. S. C. App. §462(a). The Court imposed a four year sentence and this appeal followed.

Appellant was registered with Local Board No. 35 in Brooklyn, New York. On September 13, 1966, after several student deferments, appellant was reclassified I-A. He did not appeal the classification. After successfully passing the physical examination, he was ordered to report for induction on May 4, 1967 and to complete and submit a "Statement of Personal History" to the induction center at that time.

The procedure followed at the Fort Hamilton, New York induction center where appellant was to report is to assemble the inductees in a control room where a pre-induction orientation is given. This orientation essentially consists of an explanation of what is to be done during the day. When orientation is completed, a roll call is taken and the inductees are given additional papers to fill out. Medical and mental tests follow. After each inductee is finished, he reports back to the control room where he has lunch. Thereafter the oath is given and the induction ceremony takes place. In due course, the inductees are given dinner and then sent by plane or train to their respective station destinations.

When appellant, carrying an overnight bag, arrived at Fort Hamilton at approximately 7 a.m. on May 4, 1967 he was sent to a control room where other inductees were located. Around 7:30 a.m. the enlisted man who ran the pre-induction orientation, Daniel M. Smith, entered the control room and discovered appellant handing out anti-Vietnam literature to the men assembled there. He requested appellant to refrain from distributing the literature while in the building. Appellant responded that he had a constitutional right to give out the leaflets and that he was still a civilian and not subject to military control.

Meanwhile the situation in the room became somewhat disorganized and tense. The military police were called and they requested appellant to sit down. Their request was ignored. They asked appellant to accompany them to the Provost Marshal's office where they could talk things over. This request was also ignored. Tension in the room began to mount and the situation became menacing when some of the men threatened appellant.

Appellant then began shouting obscenities, becoming, in the words of one of the military police, "a little violent, throwing his hands [out], kicking and shouting." The military police seated him in the back of the control room, but he jumped up again. With this, more military police arrived and, after 45 minutes of disruption, removed him physically to the Provost Marshal's office.

Within fifteen minutes, the military police escorted appellant out of the Fort Hamilton gates where he was met by two people. According to one of the military police "they seemed to know each other, they patted him on the back and the three of them just turned around and waved and walked up the street."

Appellant did not take the stand nor did he offer any evidence in his own behalf. His first contention is that there was insufficient evidence to support a conviction of willful failure to report for and submit to induction. The only evidence, he asserts, shows his determination to express his views to his fellow inductees, in defiance of military personnel, which he argues is not inconsistent with an intention subsequently to submit to induction. He contends that his consequent failure to submit to induction was due to the action of the induction center personnel which prevented him from taking part in the induction ceremony.

In order to avoid ambiguity in refusals to submit to induction, appellant argues that special army regulations set out a clearly defined procedure whereby a registrant expressing an intent to refuse induction will first be given an opportunity to submit, then taken aside and explained the penalties for refusal and then given an opportunity to reconsider because the sanctions are severe. Army Regulations 601-270, §40. See *Chernekoff* v. *United States*, 219 F. 2d 727 (9th Cir. 1955); *United States* v. *Hoffman*, 137 F. 2d 416 (2d Cir. 1943).

While conceding that "a registrant can so clearly manifest his intent to refuse prior to that stage so that unwillingness to submit to induction may be legitimately inferred" (Applt's Br. p. 17), appellant contends that such intent must be clearly expressed, which he asserts was lacking here. Where an inductee's intention is doubtful, the case law and the regulations are said to require that he be given a warning about the consequences of a refusal and a "last clear chance to change his mind." *Chernekoff*, *supra* at 725.

The Government's position, however, is that the evidence was sufficient to support an inference that appellant had a culpable intent not to submit to induction. We agree.

In the "Statement of Personal History" filed on the day of his induction at the center, appellant declared that "I refuse to participate in the genocidal war being waged by the U. S. government against the Vietnamese people." In the same document, he stated "The draft is an instrument of slave-labor. To submit to the draft is to risk one's life and to offer to serve as an accomplice to war crimes as defined in the Nuremburg agreements, which hold the individual responsible to refuse to cooperate in any way with such atrocious acts."

These statements, his activity in distributing leaflets, his refusal to comply with reasonable requests by induction personnel to halt so that the induction process could proceed, which refusal led to a disruption of those procedures, and the welcome he received from waiting friends on his expulsion from Fort Hamilton, taken together, sufficiently indicate that appellant had an intent not to submit to induction.

Appellant's second contention is that the prosecutor's remarks to the jury on summation were improper because they allegedly gave the impression that if the jury acquitted, appellant would "beat" his draft obligation.

The Government in its summation stated in relevant part:

> The question is did he intend to go into the Army, did he intend to do that on May 4th, and what about after May 4th? Is that it, is his obligation over?
>
> Well, if you find that his obligation was over, then this was a pretty good game, very good, well planned.
>
> * * * * *
>
> Now, this jury is being asked to further this scheme and say that this is fine. Mr. Meyers, you didn't have to go there, they threw you out, that is it, enjoy your-

self, go back to Buffalo University, the State University, go back to City College, you don't have to obey the government's orders although you are I-A, you are an exception. Of course, you also had it in mind to go down and get yourself placed in a position where you have an interesting defense to an obvious crime, an obvious crime.

We ask you to listen to the law as charged by His Honor. It is the law which will be given to you, and which we say the Grand Jury has charged has been violated.

The law is contained in a book, it is just a book. It is like any other book. There is a difference, there is our law and his law. It binds us all.

We ask that you give careful attention to His Honor and to all the exhibits which will be made available to you.

And we ask that you don't say, Okay Mr. Meyers, you beat it, nice job.

You have a duty to fulfill.

We charge he didn't fulfill his duty, but you have a duty, *and we ask that you find that the government* has proved charges against this defendant.

Thereafter, appellant's counsel objected to the summation and moved for a mistrial.

The quoted portion of the prosecutor's statements do not clearly imply that appellant would permanently avoid the draft if acquitted. By stating that Meyers deliberately placed himself in a position where he had an interesting defense to an obvious crime, the prosecutor was merely dramatizing the obvious point that if acquitted, appellant

would not have to go to jail. The summation does not constitute grounds for reversal.

The appellant also contends that the trial court's use of the "Allen Charge," *Allen* v. *United States*, 164 U. S. 492 (1896), was unnecessary and coercive because the trial was only a day and a half and the jury had deliberated for only a short time. The record shows that the jury retired to deliberate at 11:40 a.m. on the second day of trial. The jurors went to lunch at 12:50 p.m. and returned at 2:30 p.m. Sometime around 4 o'clock the judge received a note that the jury was deadlocked 11 to 1 for conviction, and he ordered them back to the courtroom where he stated:

> Members of the jury, I have received your message that you are deadlocked.
>
> It is desirable if a verdict can be reached that this be done both from the viewpoint of the defendant and the government, only, however, if the verdict reflects the conscientious judgment of each juror and under no circumstances must any juror yield his conscientious judgment.
>
> This Court has no purpose to ask and indeed does not have the right to inquire as to how you stand. But considering the length of the trial, the amount of testimony that was taken, the number of witnesses that have been heard and the prospect of another trial before another jury chosen in the same manner as you have been selected, if you fail to agree, further consideration on your part is fully justified.
>
> You have only been deliberating, as I gather it, less than two hours, and I do not consider this is a sufficient length of time to permit you a full and fair oppor-

tunity to review the evidence and discuss and consider amongst yourselves the various phases of the evidence.

I want to read you the substance of a statement contained in a United States Supreme Court opinion which is generally known to the Bench and Bar as the Allen Charge.

The Court then read from *Allen* v. *United States, supra,* affirming in conclusion that it wanted the "Members of the Jury, to continue your deliberations."

At 4:30 p.m. the jury informed the Court that it had reached a verdict; guilty on the first count (failure to report for and submit to induction) and not guilty on the second count (interfering with the administration of the selective service act).

The judge's warning that "under no circumstances must any juror yield his conscientious judgment" makes the use of the Allen charge proper and not coercive. *United States* v. *Kenner,* 354 F. 2d 780 (2d Cir. 1965), *cert. denied,* 383 U. S. 958 (1966). The fact that the judge knew that there was a lone dissenter does not make the charge coercive inasmuch as the nature of the deadlock was disclosed to the Court voluntarily and without solicitation. See *Bowen* v. *United States,* 153 F. 2d 747 (8th Cir. 1946). To hold otherwise would unnecessarily prohibit the use of the Allen charge in circumstances where the judge was made aware of the numerical division of the jurors, for example, by an over-zealous juror, although he had not made the forbidden inquiry himself.

Appellant next contends that the District Court erred in admitting highly inflammatory statements of his political beliefs contained in the "Statement of Personal History" noted above. Their admission was not error, how-

ever, because they were relevant to the question of intent. While defense counsel objected to the admission of these statements, no cautionary instruction was requested at the time they were admitted and none was given. Any possible error by the Court in not giving such an instruction was cured by the charge when the judge told the jury "to eliminate from consideration the political opinions of the defendant other than the question of intent." In addition, we note in passing that the prosecutor affirmed in his summation that Meyers' views had "nothing to do with it, he is entitled to them. His views are only important on the question of his intent."

We have considered the other points raised by appellant's counsel, including the adequacy of the charge with respect to the elements of the crime and on the issue of intent, and find they are without merit.

The decision below is affirmed.

SMITH, *Circuit Judge* (dissenting):

I dissent. While it is true that the "Statement of Personal History" indicates that when Meyers made it out he had no intention of entering the service, the fact remains that he never was given the chance. He did report, with his overnight bag, and was entitled to an opportunity to change his mind and take the oath before being charged with a refusal to submit to induction.

In addition, I think the Allen charge was uncalled for in the circumstances of this brief trial and was necessarily coercive here, since the lone dissenter presumably knew that the judge had been informed that only one juror was holding out for acquittal.

Military Selective Service Act of 1967

Sec. 12. *Penalties.*—(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title, or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title, or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto, or who conspires to commit

any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title unless such person has been actually inducted for the training and service prescribed under this title or unless he is subject to trial by court martial under laws in force prior to the enactment of this title. Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall be advanced on the docket for immediate hearing, and an appeal from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

Army Regulations

AR 601-270

40. *Processing steps for registrants in special categories.*

c. Registrants who refuse to submit to induction. Any registrant who has been removed from the group as prescribed in paragraph 37*a*(2) and who persists in his refusal to submit to induction will be informed that such refusal constitutes a felony under the provisions of the Universal Military Training and Service Act, as amended. He will be informed further that conviction of such an offense under civil proceedings will subject him to be pun-

ished by imprisonment for not more than 5 years, or a fine of not more than $10,000, or both. He will then be informed again of the imminence of induction using the language specified in paragraph 37*a*(1) and his name and service number again will be called. If he steps forward at this time, he will be informed that he is a member of the Armed Forces concerned, using the language specified in paragraph 37a(3). If, however, he persists in refusing to be inducted, the following action will be taken:

(1) The registrant will be requested, but not required, to make a signed statement, dated, in his own handwriting, as follows: "I refuse to be inducted into the Armed Forces of the United States." Such statement should be witnessed by at least two witnesses who will affix their signatures to the statement. Registrants who refuse induction will not be furnished any means of transportation.

(2) Letter of notification or refusal to submit to induction will be prepared in quadruplicate. The original, together with the voluntary statement described in (1) above, will be submitted to the United States attorney for the district in which the registrant refused to be inducted. One copy will be forwarded to the State Director, Selective Service System, of the State in which the registrant refused to be inducted; one copy will be forwarded to the Selective Service local board which delivered the registrant for induction; and the other copy will be retained at the induction station. Such notification will include the following information:

(*a*) Name and address of registrant.

(*b*) Selective Service number of registrant.

(*c*) Number and address of the Selective Service local board which delivered the registrant for induction, and if different, the registrant's own Selective Service local board.

(*d*) A detailed statement of facts concerning the registrant's refusal to be inducted.

(*e*) Names and addresses of witnesses.

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No. 312

In the Supreme Court of the United States

OCTOBER TERM, 1969

JOEL SIMON MEYERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1969. A petition for rehearing was denied on May 5, 1969. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to July 3, 1969, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's refusal to submit to induction was excused by a lack of warning as to the consequences of his act.

2. Whether the giving of the "Allen" instruction to the jurors was proper.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of a two count indictment which charged the failure to report for and submit to induction (50 App. U.S.C. 462(a)).[1] On May 17, 1968, he was sentenced to four years' imprisonment (C.A. 17, p. 10).[2]

1. Petitioner was ordered to report for and submit to induction at Fort Hamilton, New York, on May 4, 1967 (1 R. 69, 72). He was given a personal history statement form to fill out and submit at that time (1 R. 88-89). On May 4, petitioner reported prior to 7:30 a.m., and commenced passing out anti-Vietnam war literature (1 R. 127-129). The enlisted man in charge of the processing room asked petitioner to stop. Petitioner replied that he was a civilian, not subject to military orders (1 R. 129), and that the other registrants "should not go in the Army" (1 R. 130). The processing of the other registrants could not commence

[1] Petitioner was acquitted on the other count which charged that his conduct at the induction station had hindered and interfered with the administration of the Selective Service.

[2] "C.A." refers to the one volume court of appeals exhibits; "R." preceded by the volume number refers to the three volume trial transcript, consecutively paginated.

because of petitioner's insistence on his "right" to distribute the literature and because of the hostility of his audience (1 R. 130–131). When two military policemen arrived, they found petitioner making a speech (1 R. 146). Petitioner was asked to sit down (1 R. 142, 146). Petitioner replied that he was a civilian, that the military police had no authority over him and that he wanted "to talk to the boys" (1 R. 146–147, 155). Petitioner was offered the opportunity to leave voluntarily (1 R. 147). He responded by kicking and shouting (1 R. 147). Two more military policemen were called. After a total elapsed time of approximately forty-five minutes, petitioner, shouting obscenities, was dragged out of the building (1 R. 146–148, 2 R. 200–201, 211–213). Shortly afterwards, petitioner was escorted off the post (1 R. 149). Petitioner's eviction from the post occurred at approximately 8:30 a.m. (1 R. 141–142, 148). The induction ceremony, after completion of all processing, would have occurred between 3 and 4:30 p.m. (1 R. 121).

Petitioner's signed personal history statement which he submitted to the Army on May 4 (1 R. 83, 107) contained the following statements: "I refuse to participate in the genocidal war being waged by the United States government against the Vietnamese people * * *. The draft is an instrument of slave-labor. To submit to the draft is to risk one's life and to offer to serve as an accomplice to war crimes * * *" (1 R. 93–94).

2. The jury received the case shortly before the start of the noon-hour on April 5. Before going to lunch, the jury asked for an inter-office memorandum

between the induction station and the local draft board relating to contemplated further processing of petitioner. The court declined to furnish this memorandum since it had not been introduced in evidence (3 R. 282–286).[3] The jury returned from lunch at approximately 2:15 p.m. About two hours later, the jury sent a message to the court, stating "Count 1 and 2 hopelessly deadlocked, vote 11 guilty, 1 not guilty" (C.A. 17, p. 2–3). The court had the jury assembled and advised them of the desirability of reaching a verdict. After some prefatory remarks of its own (Pet. App. 7a), the court gave the instruction approved by this Court in *Allen* v. *United States*, 164 U.S. 492, and asked the jurors to continue their deliberations (3 R. 289–291). At 4:30 p.m. the jury returned with a verdict of guilty as to the failure-to-submit-to-induction count, and not guilty as to the other count (3 R. 292–293).

ARGUMENT

1. Army regulations (see Pet. App. 11a) provide that a registrant who has reported for induction, but refuses to take the ceremonial step forward that constitutes the final step in the process of induction, shall be removed from the group of inductees and given a warning as to the possible consequences of his refusal. Petitioner argues he was also entitled to such a "last clear chance" warning (Pet. 5–7). The Army regulations, however, can have no application to a disruptive registrant like petitioner who makes it impossible for

[3] The jury was alerted to the existence of this memorandum by a reference to it contained in an exhibit that had been received in evidence.

the Army to start processing him for induction. See *United States* v. *Mansavage*, 178 F. 2d 812, 818 (C.A. 7), certiorari denied, 339 U.S. 931; *United States* v. *Collura*, 139 F. 2d 345 (C.A. 2). Cf. *Service* v. *Dulles*, 354 U.S. 363. The duty to report for induction in accordance with the draft board's order includes the duty to submit to induction. Refusal to do so violates the Selective Service laws as clearly as does the refusal to report at all. *Estep* v. *United States*, 327 U.S. 114. Petitioner's offense was complete when he refused to cooperate with the induction station personnel (1 R.142) and insisted on his right to disrupt the proceedings. Since petitioner's own conduct necessitated his removal, making it impossible to process him at all, the final step warning was not required. Nor does petitioner's case present a conflict with *Chernekoff* v. *United States*, 219 F. 2d 721 (C.A. 9). There it was held that the final induction ceremony must be followed "unless the selectee himself makes it impossible" (219 F. 2d at 725). Here the record shows (and petitioner does not dispute the fact) that petitioner deliberately sought to make it impossible for the Army to start processing him for induction.

2. The record supports the determination of the court of appeals that the giving of the *Allen* charge (*Allen* v. *United States*, 164 U.S. 492) was not reversible error (Pet. App. 7a–8a). The pre-lunch deliberative session of the jury had been brief and had resulted in a request for an exhibit that was not in evidence. It was only after the court declined to furnish the exhibit, and after the luncheon recess, that the jury made a productive effort to reach its verdict.

The issue as to Count 2 was of some complexity since it involved the question whether the interference by petitioner had been with the Selective Service system, as charged, or solely with military personnel (2 R. 220). When, after only two hours of afternoon deliberation, the jury reported it was hopelessly deadlocked, the trial court acted within its discretion in urging the jury to continue their deliberations. The trial proper had taken up two days of court time. Petitioner had no right as a matter of law to a mistrial after such brief deliberative sessions on the third day. *Burrup* v. *United States,* 371 F. 2d 556 (C.A. 10), certiorari denied, 386 U.S. 1034; *United States* v. *Barnhill,* 305 F. 2d 164 (C.A. 6), certiorari denied, 371 U.S. 865.

No federal court that has considered the question has held that the giving of an *Allen* charge is reversible error. *E.g., Fulwood* v. *United States,* 369 F. 2d 960 (C.A.D.C.), certiorari denied, 387 U.S. 934; *United States* v. *Rao,* 394 F. 2d 354, 356 (C.A. 2), certiorari denied, 393 U.S. 845. While the Third and Seventh Circuits have ordered that henceforth the *Allen* charge should be modified, *United States* v. *Fioravanti,* No. 17398, C.A. 3, decided June 16, 1969, petition for certiorari filed *sub nom. Panaccione* v. *United States,* No. 333, this Term; *United States* v. *Brown,* No. 16772, C.A. 7, decided June 6, 1969, petition for certiorari filed, No. 551 Misc., this Term, in both cases the court affirmed the convictions, finding that the giving of the *Allen* charge did not violate the defendant's rights. The fact that two circuits have determined to order a modification of the *Allen*

charge in the exercise of their supervisory power does not create a conflict requiring review by this Court.

No prejudice resulted from the voluntary disclosure by the jury as to how it was divided. The court instructed the jury that it "had no purpose to ask and indeed does not have the right to inquire as to how you stand." (3 R. 289). The judge had made it clear that "under no circumstances must any juror yield his conscientious judgment" (see Pet. 7a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

Office-Supreme Court, U.S.
FILED
AUG 1 1969
JOHN F. DAVIS, CLERK

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PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

Recent decisions in the Third and Seventh Circuits regarding the use of the Allen charge are in direct conflict with the decision below.

In its Brief in Opposition, the Government cites two circuit court cases which, although decided a few weeks before the filing of the petition in this case, were still not reported at that time. *United States* v. *Fioravanti,* No. 17398, 38 LW 2016 (July 8, 1969) (3rd Circuit, decided June 16, 1969), petition for certiorari filed *sub nom. Paccione* v. *United States,* No. 333; *United States* v. *Brown,* No. 16772 (7th Cir., decided June 6, 1969), petition for certiorari filed, No. 551 Misc. Both cases flatly abolish the use of the standard Allen charge in their respective circuits, a policy in direct conflict with that of the Second Circuit, which upheld the Allen charge in this case.

The Government seeks to minimize this conflict by suggesting that the Third and Seventh Circuits have only or-

dered a "modification" of the Allen charge (Brief in Opposition 6). In fact, both courts, although not barring supplemental charges outright, eliminated the *sine qua non* of the Allen charge by prohibiting any language which implies a special duty of minority jurors to reconsider their views. That language is "the very real treachery of the Allen Charge", *United States* v. *Fioravanti, supra*, 38 LW at 2016, and was used by the trial court in this case.

Nor is the conflict minimized by the fact that convictions were not reversed in either of those cases. Neither case presented evidence of jury coercion which even approached that presented by this case. In fact, in *Fioravanti* the charge was not even a supplemental one, but rather was included in the main charge to the jury; and in *Brown* the direction to reconsider was given to both the majority and minority jurors. By contrast, the trial judge below gave the traditional Allen charge—with its warning to the minority—at the traditional time, after the jury reported that it was deadlocked. Moreover, unlike the judges in *Brown* and *Fioravanti*, he gave the charge knowing of the jury's numerical division.

Finally, it should be noted that both the Third and Seventh Circuits considered various constitutional implications of the Allen charge, suggesting possible fifth and sixth amendment violations. Each court, however, found it unnecessary to reach those issues under the circumstances of its case.

CONCLUSION

Review should be granted because the decision of the court below is in conflict with the decisions of other circuits, because it raises substantial constitutional questions, and because it sanctions a departure from the usual course of judicial proceedings so as to justify the exercise of this court's supervisory power.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 312

JOEL SIMON MEYERS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Pursuant to Rule 58(2) of the Rules of this Court, petitioner respectfully prays for a rehearing of the order denying the petition for a writ of certiorari previously filed. The order denying the petition was entered on October 14, 1969.

Rehearing is sought on the grounds that cases not reported until after the filing of petitioner's supplemental brief substantially broaden the conflict between the decision of the court below and decisions of other circuits. In addition, a recently reported decision of the Second Circuit itself raises doubt as to whether the court below was fully aware of the implications of its decision.

These cases relate to the Allen charge, which was given by the trial court in this case under circumstances not ap-

proved, either alone or collectively, in any other reported case. The issue is discussed at length in the petition (pp. 10-16) and in petitioner's supplemental brief.

Petitioner urged that certiorari be granted because two circuits, in direct conflict with the decision below, had abolished use of the Allen charge. *United States* v. *Fioravanti*, 412 F.2d 407 (3d Cir. 1969), *cert. denied sub nom. Panaccione* v. *United States*, 28 U.S.L.W. 3128 (October 14, 1969); *United States* v. *Brown*, 411 F.2d 930 (7th Cir. 1969), petition for certiorari filed, No. 551 Misc. Now two more circuits have discouraged use of the Allen charge.

In *Sullivan* v. *United States*, 414 F.2d 714 (9th Cir. 1969), the Ninth Circuit expressed "doubt that it is really any longer advisable to give the Allen instruction at all. . . ." *Id.* at 716. And the Tenth Circuit, in *United States* v. *Winn*, 411 F.2d 415 (1969), acknowledging the substantial criticism of the Allen charge, "cautiously approved" the charge, but thought it more appropriately "given before the jury initially retires." *Id.* at 416.

Thus, four circuits have adopted policies regarding the Allen charge which are either directly or implicitly in conflict with the decision of the Second Circuit in this case. Significantly, even the Second Circuit appears reluctant to acknowledge the circumstances under which it approved the giving of the Allen charge in *Meyers*. In *United States* v. *Barash*, 412 F.2d 26 (2d Cir. 1969), the court upheld an Allen charge against an argument that it was prematurely given—some thirteen hours after deliberations had commenced. After the court had indicated that the trial judge had acted within its discretion in so timing the charge, it added this noteworthy footnote:

> "The minimum limits as to prematurity in this court appear to have been established in *United States* v. *Kenner*, 354 F.2d 780 (2d Cir. 1965), *cert. denied*, 383 U.S. 958 . . . (1966), in which an Allen charge was given after the jury had deliberated for three hours and 45 minutes. . . . That case was saved from reversal by the 'barest margin'. . . . " *Id.* at 32, n. 11.

If a charge is saved from being premature by the "barest margin" when given after three hours and 45 minutes of deliberations, what of the Allen charge in this case, given only two hours and 50 minutes after the jury began deliberating. Since this fact was brought to the attention of the court in petitioner's brief to the Court of Appeals and was acknowledged by the court in mentioning the hours of the jurors' deliberations in its opinion, one can only assume that the Second Circuit will not use *Meyers* as its standard in determining minimum limits as to prematurity of an Allen charge.

In short, *Meyers* may simply be an anomaly among the Allen charge decisions, in conflict with some circuits, running counter to the trends in others, and even ignored by its own. It seems likely that its excesses will be duplicated by no other court and that in time all the circuits may follow the lead of the Third, Seventh, Ninth and Tenth Circuits in barring or discouraging the use of the Allen charge. Under these circumstances, the present conflict in the circuits would be resolved without the need for further comment by this Court. Unfortunately, that would leave standing the decision—and, more importantly, the sentence—in the case which had sanctioned the most extraordinary use of the Allen charge in its history.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the petition for rehearing be granted, that this Court vacate its prior order denying the petition for writ of certiorari, and grant the same, and for such other and further relief as may be just.

Respectfully submitted,

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Certificate of Counsel Under Rule 58

I, ALAN H. LEVINE, counsel for petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that such petition is restricted to the grounds specified in Rule 58 of the Rules of this Court.

ALAN H. LEVINE